Supreme Court, U.S.
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No. 02-338

In the Supreme Court of the United States

UNITED FEDERAL LEASING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim against the United States for damages resulting from delay in the return of leased equipment sounds in contract rather than in tort, and therefore is subject to the jurisdictional limitations of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The opinion of the district court (Pet. App. 8a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on April 17, 2002. A petition for rehearing was denied on June 14, 2002 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on September 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a procurement contract governed by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.* The CDA is a comprehensive statutory scheme for resolving disputes "relating to" contracts entered into by executive agencies for, *inter alia*, construction, maintenance, and the procurement of goods and services. 41 U.S.C. 602, 605(a).[1] Under the CDA, jurisdiction over such disputes is vested in agency boards of contract appeals or the Court of Federal Claims, 41 U.S.C. 605(a), 606, 609(a)(1), with appeal to the United States Court of Appeals for the Federal Circuit, 28 U.S.C. 1295(a)(3) and (10). The review procedures set out in the CDA are exclusive, 41 U.S.C. 605(b); thus, district courts have no jurisdiction over claims founded on government contracts.

2. Petitioner United Federal Leasing, Inc. is the assignee of a subcontractor on a procurement contract with the United States Navy. The Navy entered into a contract with Electronic Data Systems Corporation

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[1] Before the CDA was enacted, claims brought on government procurement contracts were governed by the Tucker Act. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified at 28 U.S.C. 1491(a)). The Tucker Act provides a waiver of sovereign immunity for money claims against the government brought in the Court of Federal Claims, including contractual claims, but expressly excludes claims "sounding in tort." 28 U.S.C. 1491(a)(1). The Tucker Act also establishes concurrent jurisdiction in the district courts for contract claims not exceeding $10,000, in a provision known as the "Little Tucker Act." 28 U.S.C. 1346(a)(2). After enacting the CDA, Congress amended the Little Tucker Act to exclude district court jurisdiction over "any civil action or claim against the United States founded upon any express or implied contract with the United States * * * which [is] subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act." *Ibid.*

(EDS) for the leasing of computer equipment. EDS arranged to obtain certain equipment from EMC Corporation (EMC), a computer manufacturer. Pet. App. 2a-3a, 25a-27a. EMC then entered into a contract with petitioner to finance its performance of the subcontract with EDS. Pursuant to that contract, petitioner provided EMC with an up-front payment of principal and in exchange assumed EMC's rights and interests in the leased computer equipment. *Id.* at 3a, 27a.

On August 31, 1998, the government's contracting officer informed EDS that it was cancelling the computer leases effective September 30, 1998. Pet. App. 3a, 31a-32a. Upon learning of the cancellation, petitioner demanded that EMC uninstall the computer equipment and make it available for removal and resale. *Id.* at 3a-4a, 32a. When EMC did not comply, petitioner turned to EDS with the same demand. *Id.* at 3a. EDS responded that it no longer had any rights or interests in the equipment because the prime contract had been satisfied and because it had assigned its rights to EMC. *Ibid.* Petitioner also contacted the Navy, explaining that it owned the computer equipment and insisting that the Navy return it. *Ibid.*; *id.* at 32a. The Navy responded by letter dated October 19, stating that it had terminated the prime contract with EDS and that it had "no contractual arrangement with your company, [so] you will need to pursue your interest with whomever you have contracted with for this equipment." *Id.* at 3a-4a, 32a, 40a-41a. According to petitioner, the Navy continued to use the computers until November 1998, when EMC removed them. *Id.* at 4a, 33a.

3. In October 1998, petitioner filed an administrative claim under the Federal Tort Claims Act (FTCA),[2] asserting that the Navy had converted its computer equipment. Pet. App. 4a, 33a. The government denied the claim and petitioner then sued both EMC and the United States in district court. *Id.* at 23a-39a. Petitioner since has settled its claims against EMC. Pet. ii; Pet. App. 4a.

The district court dismissed petitioner's claim against the government for lack of subject matter jurisdiction, Pet. App. 8a-20a, explaining in an unpublished order that the claim, although expressed in terms of conversion, "sounds in contract because it is necessary to look at the terms of the contracts between Plaintiff, EMC, EDS, and the Navy to find the source of the rights Plaintiff claims in the computer equipment," *id.* at 17a. Therefore, the court reasoned, petitioner's suit is subject to the jurisdictional limitations set forth in the CDA and cannot proceed in district court. *Ibid.* In support of that conclusion, the court relied on *United States* v. *J & E Salvage Co.*, 55 F.3d 985, 988-989 (4th Cir. 1995), which held that, when a conversion claim depends on a government contract to establish the parties' respective rights in the property, the claim is based in contract and governed by the CDA's procedural requirements. Pet. App. 17a-18a.

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[2] The FTCA was adopted in 1946 and provides a waiver of sovereign immunity for certain tort claims. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified as amended in scattered sections of 28 U.S.C.). In general, the FTCA provides that the United States is liable in tort for the negligent or wrongful act or omission of any federal government employee acting within the scope of his or her official duties, if a private party would be liable under the law of the place where the act or omission occurred. 28 U.S.C. 2672.

The district court rejected petitioner's argument that its claim was not a contract claim because it had no privity with the government, observing that petitioner was "connected to [the Navy] via a government contract." Pet. App. 18a. The court also rejected petitioner's claim that it should be permitted to proceed in tort because, under the CDA, a subcontractor may not sue the government directly in the Court of Federal Claims. See 41 U.S.C. 601(4), 605(a) (providing that only "a party to a Government contract" may sue the government directly). The court explained that "Congress has provided other avenues" for subcontractors to pursue contract claims against the government, and that it would contravene the purposes of the CDA to "permit[] parties indirectly connected to the government to sue the government in district court, after closing the doors of district courts to contractors." Pet. App. 19a-20a.

The court of appeals affirmed the dismissal in an unpublished decision. Pet. App. 1a-7a. Framing the issue as whether petitioner's claim against the government "is based in contract or tort," the court concluded that the claim is "inextricably grounded in contract, and thereby governed by" the CDA. *Id.* at 2a. In so holding, the court of appeals adopted the district court's analysis and its reliance on *J & E Salvage*, *supra*. Pet. App. 6a-7a. Petitioner filed a motion for rehearing, which the court denied without opinion. *Id.* at 21a-22a.

ARGUMENT

The court of appeals' judgment is correct and its unpublished opinion does not conflict with any decision of this Court or any other court of appeals. Therefore, review by this Court is unwarranted.

1. a. The court of appeals' decision rests on a longstanding and fundamental distinction between the jurisdiction of the Court of Federal Claims over contractual claims against the United States and the jurisdiction of the federal district courts over claims sounding in tort. Congress vested the Court of Federal Claims with jurisdiction over all actions against the United States "founded * * * upon any express or implied contract with the United States." 28 U.S.C. 1491(a)(1). By virtue of the CDA, the court's jurisdiction over contractual claims extends to all claims by contractors against the federal government "relating to a [procurement] contract." 41 U.S.C. 605(a), 609(a). With exceptions not relevant here, that grant of jurisdiction is exclusive; district courts have no general subject matter jurisdiction over contractual claims against the United States.[3]

The FTCA vests district courts with jurisdiction over tort claims against the United States. 28 U.S.C. 1346(b); see 28 U.S.C. 2680 (exceptions to FTCA jurisdiction). However, courts have been careful not to allow plaintiffs to cross the jurisdictional boundary between tort and contract by disguising contractual claims in the language of tort and invoking the jurisdiction granted by the FTCA. As numerous courts have recognized, when a plaintiff's claim against the United States, although framed as a tort, ultimately depends on the existence or terms of a contract with the federal government, the plaintiff may not proceed

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[3] As noted, the Little Tucker Act gives district courts jurisdiction over contractual claims against the United States that do not exceed $10,000, but that limited grant of jurisdiction does not apply to contract claims that are subject to the CDA. See 28 U.S.C. 1346(a)(2); note 1, *supra*.

in district court on the basis of the FTCA. See, *e.g.*, *J & E Salvage*, *supra*; *Petersburg Borough* v. *United States*, 839 F.2d 161, 163 (3d Cir. 1988); *Ingersoll-Rand Co.* v. *United States*, 780 F.2d 74, 77 (D.C. Cir. 1985); *Blanchard* v. *St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351, 357 (5th Cir.), cert. denied, 382 U.S. 829 (1965); *Woodbury* v. *United States*, 313 F.2d 291, 295-296 (9th Cir. 1963); *Advanced Materials, Inc.* v. *United States*, 955 F. Supp. 58 (E.D. La. 1997), aff'd, 136 F.3d 137 (5th Cir. 1998) (Table), cert. denied, 526 U.S. 1088 (1999); *Southwest Marine, Inc.* v. *United States*, 926 F. Supp. 142, 146-147 (N.D. Cal. 1995). The decision below is predicated on that basic jurisdictional principle.

Petitioner concedes (Pet. 10) that the court of appeals "correctly set forth the dichotomy between FTCA jurisdiction over tort suits and CDA jurisdiction over contract suits." It contends, however, that the court of appeals misapplied that principle in this case by characterizing petitioner's claim as contractual. Such a fact-bound claim, resolved in an unpublished opinion, does not warrant further review and, in any event, is without merit.

b. The court of appeals correctly concluded that petitioner's conversion claim is essentially one of contract. The crux of the claim is that the Navy violated petitioner's property rights in the leased computers by keeping them for approximately six weeks after the termination of the prime contract. That claim cannot be resolved without reference to and interpretation of the various contracts governing the computer leases, including the prime contract between the Navy and EDS. Those contracts determine the parties' respective rights and obligations with respect to the computers upon termination of the prime contract, and therefore

establish whether the Navy's continued use of the computer equipment was wrongful.

The court of appeals' judgment in the instant case follows from its earlier decision in *J & E Salvage*, *supra*. There, the government claimed conversion after it learned that several containers it had sold in the belief that they were empty actually contained valuable property. The merits of the government's claim turned on whether the sale agreement was broad enough to encompass the contents of the containers and, thus, whether the buyer's continued possession of that property was lawful. The court explained that, "[i]n order to decide [such questions], it is impossible to ignore the terms of the contract documents surrounding the sale." 55 F.3d at 988. Because the conditions of the government contract "control[led] the outcome of [the] case," the court concluded that the conversion claim was in essence a contract claim. *Ibid.*

The same reasoning applies here: It is impossible to ignore the terms of the Navy's leasing contract in determining whether its continued possession of the computer equipment after termination of that contract was wrongful. The prime contract governed termination of the leases and "described the removal responsibilities for the computer equipment upon contract termination." Pet. App. 2a. Thus, just as arguing that the buyer in *J & E Salvage* "converted" the property inside the containers was "the same thing as saying that [the property was] not covered by the bill of sale," 55 F.3d at 989, arguing that the Navy "converted" the computer equipment here is the same thing as saying that the Navy was obligated under its contract with EDS to return the leased equipment to petitioner immediately upon termination of the lease. In either case, "it is possible to conceive of [the] dispute as

entirely contained within the terms of the contract." *Id.* at 988 (quoting *Ingersoll-Rand*, 780 F.2d at 78). The court of appeals correctly concluded that such disputes are subject to the jurisdictional limitations set out in the CDA and cannot proceed in district court.

2. Petitioner argues that the court of appeals' unpublished opinion creates a conflict with decisions by the Third, Ninth, and Federal Circuits. That is incorrect. The cases on which petitioner relies support the proposition that claims that are based on a government contract are governed by the CDA (or, in some circumstances, the Tucker Act) and outside the jurisdiction of the district courts. As such, they are consistent with the court of appeals' holding in this case; they differ only in their application of that general principle to the particular facts of each dispute.

Petitioner relies on the Ninth Circuit's decision in *Love* v. *United States*, 915 F.2d 1242 (1989), as evidence of the purported conflict. *Love* involved farm equipment and livestock that were used as collateral for a government loan, then seized and sold by the government after the Loves defaulted. The Ninth Circuit held that the district court had jurisdiction over the Loves' claim of conversion. *Id.* at 1245-1248. It emphasized that "the government's liability [did] not 'depend[] wholly upon the government's alleged promise'" in the loan contract, but turned on questions of state law such as the nature of the Loves' interest in the property and the validity of the government's notice of seizure. *Id.* at 1246 (quoting *Woodbury* v. *United States*, 313 F.2d 291, 296 (9th Cir. 1963)). Here, by contrast, all of the Navy's rights and duties with respect to the computers—from initial acquisition under the lease to the return of the computers after termination of the procurement contract—arose out of and were controlled by the terms

of that contract. Thus, the court of appeals' decision in this case does not conflict with the holding in *Love*.

Petitioner also relies on *Wood* v. *United States*, 961 F.2d 195 (Fed. Cir. 1992), which held that the district court did *not* have jurisdiction under the FTCA where the plaintiff's tort claim "ar[ose] primarily from a contractual undertaking" and where "the alleged contract establishe[d] the cause of action." *Id.* at 198 (internal quotation marks omitted). In so holding, the court rejected the plaintiff's attempt to align his case with *Love*, explaining that, "where the 'tort' complained of is based entirely upon breach by the government of a promise made by it in a contract, so that the claim is in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, we do not think that the common law or local state law right to 'waive the breach and sue in tort' brings the case within the Federal Tort Claims Act." *Ibid.* (quoting *Woodbury*, 313 F.2d at 295). The court of appeals' holding in this case is consistent with that formulation: Petitioner's claim is based on the government's breach of its duty to return the computer equipment upon termination of the lease—a duty created, if at all, by the terms of the procurement contract. As such, petitioner's claim of wrongful conversion is, in substance, a breach of contract claim.

Finally, petitioner points to the Third Circuit's nearly half-century-old decision in *Aleutco Corp.* v. *United States*, 244 F.2d 674, 679 (1957), which rested in part on the view that, when a claim sounds both in contract and in tort, the plaintiff may waive the breach and proceed under the FTCA. As petitioner concedes (Pet. 12), however, recent cases have not followed that aspect of the decision. Instead, the Third Circuit has described *Aleutco* as holding "that the mere fact that a claimant

and the United States are in a contractual relationship does not convert a claim that would otherwise be for a tort into one sounding in contract." *Petersburg Borough*, 839 F.2d at 162 (holding that plaintiff's claim, although framed in terms of tort, was in essence a contract claim because it was based on the government's alleged breach of its promise to close on a loan agreement without delay). The court of appeals' characterization of petitioner's claim as primarily contractual does not conflict with that rule, as it rests—not on the mere existence of a contract—but on the fact that the merits of petitioner's claim depend on what that contract says about the parties' respective rights and obligations upon termination of the computer leases.

In sum, the court of appeals' unpublished opinion in this case does not conflict with the decisions from the Third, Ninth, and Federal Circuits. Despite some differences in the courts' language, the outcome of the case likely would have been the same regardless of where it arose. In any event, petitioner concedes that *J & E Salvage*, *supra*, the Fourth Circuit court of appeals' only published, precedential decision on the issue of CDA jurisdiction, does not create a circuit conflict. See Pet. 13 ("It is not *Salvage* but this case that puts the Fourth Circuit in conflict with the Ninth, Third and Federal Circuits."). When the *published* decision of the court of appeals on the issue is in harmony with the other circuits, an *unpublished* and nonprecedential decision does not create a conflict in the published authorities and does not call for intervention by this Court.

3. Petitioner suggests, finally, that the jurisdictional standard set forth in *J & E Salvage* and other similar cases is not relevant to its claim because it is not in

privity with the government and therefore cannot use the CDA procedures. Pet. 11 n.13. Petitioner is correct that, absent exceptions not relevant here,[4] subcontractors and their assignees cannot sue the government directly under the CDA. But it does not follow that petitioner therefore is entitled to proceed in the district court under the FTCA.

The CDA contains a limited waiver of sovereign immunity for contract-related suits by "contractor[s]," 41 U.S.C. 605(a), which are defined as "part[ies] to a Government contract," 41 U.S.C. 601(4). Congress believed that it would be inefficient to permit subcontractors to proceed directly against the government. S. Rep. No. 1118, 95th Cong., 2d Sess. 16-17 (1978) ("If direct access were allowed to all Government subcontractors, contracting officers might, without appropriate safeguards, be presented with numerous frivolous claims that the prime contractor would not have sponsored."). Instead, subcontractors that are aggrieved by the government's conduct in relation to a contract may seek relief through a "sponsorship" arrangement whereby the prime contractor brings suit against the government on the subcontractor's behalf. *Ibid.*; see *Arnold M. Diamond, Inc.* v. *Dalton*, 25 F.3d 1006, 1009 (Fed. Cir. 1994) (describing sponsorship approach). Had petitioner followed the sponsorship approach here, there is no question that any resulting suit by EDS would have been subject to the provisions of the CDA vesting exclusive jurisdiction in the Navy Board of

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[4] See *RMI Titanium Co.* v. *Westinghouse Elec. Corp.*, 78 F.3d 1125, 1138-1142 (6th Cir. 1996) (explaining that a subcontractor may sue directly under the CDA if it is "otherwise in privity" with the government) (citing *United States* v. *Johnson Controls, Inc.*, 713 F.2d 1541, 1553 (Fed. Cir. 1983)).

Contract Appeals or the Court of Federal Claims. Allowing petitioner to bring precisely the same suit in district court would improperly expand the government's waiver of sovereign immunity, by permitting a party that Congress explicitly excluded from even the narrow review procedures authorized by the CDA to sue the government directly, and in a forum that Congress explicitly rejected for resolution of contract-based disputes. Thus, courts that have addressed the issue have interpreted the CDA to bar district court jurisdiction over subcontractor claims against the government if the prime contract is covered by the CDA.[5] See, *e.g.*, *Eastern, Inc.* v. *Shelley's of Del., Inc.*, 721 F. Supp. 649, 651 (D.N.J. 1989); *Arntz Contracting Co.*, 84-3 BCA (CCH) ¶ 17,604 (E.B.C.A. 1984), aff'd, 769 F.2d 770 (Fed. Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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[5] Although subcontractors like petitioner cannot sue the government directly, they are not without a remedy for harms related to government contracts. As noted, a subcontractor may be able to seek relief from the government through a sponsorship suit. Alternatively, a subcontractor may obtain relief from the party or parties with which it is in privity. Indeed, petitioner pursued that remedy in this case: it sued EMC and obtained a settlement.